

HON. JUDGE MARY K. DIMKE

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*Plaintiff*

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

WILLIAM C. SCHROEDER, an  
individual,  
  
Plaintiff,  
  
vs.  
  
UNITED STATES OF AMERICA,  
  
Defendant.

No. 2:22-cv-00172-MKD

**PLAINTIFF'S RESPONSE TO  
MOTION TO DISMISS**

[ECF 6]

*November 9, 2022  
Without Oral Argument*

**SUMMARY**

Does the Constitution permit one federal House district to be comprised of 990,837 people, while another has only 542,704? The Supreme Court has previously held that “congressional representation must be based on population as nearly as is practicable.” *Reynolds v. Sims*, 377 U.S. 533, 577 (1962).

[F]undamentally, “vote dilution” in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents.

*Rucho v. Common Cause*, 139 S.Ct. 2484, 2501 (2019) (Roberts, C.J.).

*Rucho* recently identified three types of Article I, § 2 claim: (1) “vote dilution” one person, one vote claims; (2) racial gerrymandering claims; and (3)

partisan gerrymandering claims. *Id.*, 139 S.Ct. at 2495-96 (2019). While partisan gerrymandering claims are not justiciable, ‘one person, one vote’ claims are. *Id.* at 2494-95 (citing *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964), and *Shaw v. Reno*, 509 U.S. 630 (1993)).

The instant case is expressly a ‘one person, one vote’ claim:

[] 2 U.S.C. § 2a(a), which permanently limits the House of Representatives to 435 members, deprives citizens and residents of their constitutional right to equal representation in the House of Representatives [Art. I, § 2].

[] Furthermore, 2 U.S.C. § 2a(a), which permanently limits the House of Representatives to 435 members, deprives citizens and residents of their constitutional right to equal representation in the electoral college for the presidency [Art. II, § 1]

[] Congress’ failure to increase or otherwise change the number of Representatives commensurate with the total population of the United States and the relative populations of the several States, and instead leaving the number [435] unchanged since 1912, and self-executing since 1941, violates the ‘one person, one vote’ principle.

[] Particularly when read together with the Art. II, § 1 requirements of the ‘electoral college,’ as well as the other above-quoted sections of the Constitution pertaining to voting, the ‘one person, one vote’ principle must apply to relative district size among the states, as well as within each state.

[ECF 1 at 58-59 ¶¶142-45]

The right to vote is fundamental. See *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1962). “[T]he Citizenship Clause [of the Fourteenth Amendment] guarantees citizens equal treatment by the Federal Government with respect to civil rights.” *U.S. v. Vaello Madero*, 142 S.Ct. 1539, 1551 (2022) (Thomas, J., concurring). Individual citizens have standing to bring ‘one person, one vote’ claims pursuant to Article I, § 2 regarding “malapportionment of congressional districts” because

1 the Constitution “require[s] that ‘one man’s vote in a congressional election is to  
2 be worth as much as another’s.’” *Rucho v. Common Cause*, 139 S.Ct. at 2496  
3 (quoting *Wesberry v. Sanders*, 376 U.S. at 7)). See, also, *Baker v. Carr*, 369 U.S.  
4 186, 199 (1962) (individual standing to challenge apportionment under Fourteenth  
5 Amendment). “[C]ongressional representation must be based on population as  
6 nearly as is practicable.” *Reynolds v. Sims*, 377 U.S. at 577. “[E]ach representative  
7 must be accountable to (approximately) the same number of constituents.” *Rucho*  
8 *v. Common Cause*, 139 S.Ct. at 2501.  
9

10  
11 Subsequent to the twenty-fourth census, operation of 2 U.S.C. § 2a(a)  
12 automatically retained the 435-member cap, and automatically re-apportioned  
13 House seats such that presently, *e.g.*, Montana voters reside within House districts  
14 comprised of 542,704 resident persons, while Delaware voters reside within a  
15 House district comprised of 990,837 resident persons. [ECF 1 at 54] Each Montana  
16 vote in a race for the House is worth almost two (2) Delaware votes; alternatively,  
17 one (1) Delaware vote is only about half ( $\frac{1}{2}$ ) of a Montana vote.  
18

19 2 U.S.C. § 2a(a), which has permanently capped the House of  
20 Representatives at 435 members for more than a century, and which automatically  
21 apportions House seats to the States without regard to equalizing the population of  
22 each congressional district among the States, violates Article I, § 2. As provided  
23 in the recent *Rucho* decision, Plaintiff has standing to bring this ‘one person, one  
24 vote’ claim, which is justiciable. *Rucho v. Common Cause*, 139 S.Ct. at 2495-96.  
25 Defendant’s Motion to Dismiss should therefore be denied.  
26  
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28

## FACTUAL AND PROCEDURAL HISTORY

### A. The Composition of the House of Representatives.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States[.] ... Representatives ... shall be apportioned among the several States which may be included within this Union, according to their respective ...whole Number of [ ] Persons[.] ... The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative[.]

U.S.CONST., Art. I, § 2.

“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress[.]”

U.S.CONST., Art. II, § 1.

On September 25, 1789, the First Congress proposed twelve (12) “Articles” [of amendment] to the Constitution. Article “the first”, never ratified, provides:

After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

[See ECF 1 at 4 ¶15]

**B. Equal-Sized Congressional Districts Apportioned Among The States According To Population, 1790 to 1910.**

The **first** census counted 3,929,214 resident persons of the thirteen (13) United States, as of August 2, 1790. “[T]he House of Representatives shall be composed of members elected agreeably to **a ratio of one member for every thirty-three thousand persons in each state[.]**” Apportionment Act of April 14, 1792, 2nd Cong., Sess. I, Ch. 23.

The **second** census counted 5,308,483 resident persons in the sixteen (16) United States, as of August 4, 1800. “[T]he House of Representatives shall be composed of **[141] members** elected agreeably to **a ratio of one member for every thirty-three thousand persons in each state[.]**” Apportionment Act of January 14, 1802, 7th Cong., Sess. I, Ch. 1.

The **third** census counted 7,239,861 resident persons in the seventeen (17) United States, as of August 6, 1810. “[T]he House of Representatives shall be composed of **[181] members** elected agreeably to **a ratio of one representative for every thirty-five thousand persons in each state[.]**” Apportionment Act of December 21, 1811, 12th Cong., Sess. I, Ch. 9.

The **fourth** census counted 9,638,453 resident persons in the twenty-three (23) United States, as of August 7, 1820. “[T]he House of Representatives shall be composed of **[215] members** elected agreeably to **a ratio of one representative for every forty-seven thousand persons in each state[.]**” Apportionment Act of March 7, 1822, 17th Cong., Sess. I, Ch. 10 (March 7, 1822).

1           The **fifth** census counted 12,860,702 resident persons in the twenty-four  
2 (24) United States, as of June 1, 1830. “[T]he House of Representatives shall be  
3 composed of **[240] members**, elected agreeably to **a ratio of one representative**  
4 **for every forty-seven thousand and seven hundred persons in each state[.]**”  
5 Apportionment Act of May 22, 1832, 22nd Cong., Sess. I, Ch. 91.  
6

7           The **sixth** census counted 17,063,353 resident persons in the twenty-six (26)  
8 United States, as of June 1, 1840. “[T]he House of Representatives shall be  
9 composed of **[223] members** elected agreeably to **a ratio of one Representative**  
10 **for every seventy thousand six hundred and eighty persons in each State, and**  
11 **of one additional representative for each State having a fraction greater than**  
12 **one moiety of the said ratio[.]**” Apportionment Act of June 25, 1842, 27th Cong.,  
13 Sess. II, Ch. 47.  
14

15           The **seventh** census counted 23,191,876 resident persons in the thirty (30)  
16 United States, as of June 1, 1850. “[T]he whole number of representatives is  
17 hereby **increased to two hundred thirty-four [234][.]**” Apportionment Act of  
18 July 30, 1852, 32nd Cong., Sess. I, Ch. 74.  
19

20           The **eighth** census counted 31,443,321 resident persons in the thirty-three  
21 (33) United States, as of June 1, 1860. “[T]he number of members of the House of  
22 Representatives of the Congress of the United States shall be two hundred and  
23 forty-one **[241]**, and the eight additional members shall be assigned one each to  
24 Pennsylvania, Ohio, Kentucky, Illinois, Iowa, Minnesota, Vermont, and Rhode  
25 Island.” Apportionment Act of March 4, 1862, 37th Cong., Sess. II, Ch. 36.  
26  
27  
28

1 “Representatives shall be apportioned among the several States according  
2 to their respective numbers, counting the whole number of persons in each  
3 State[.]” U.S.CONST. Fourteenth Amend. § 2. “All persons born or naturalized in  
4 the United States, and subject to the jurisdiction thereof, are citizens of the United  
5 States and of the State wherein they reside.” U.S.CONST. Fourteenth Amend. §  
6 1. Each citizen has a “right to vote at any election for the choice of electors for  
7 President and Vice-President of the United States, Representatives in Congress,  
8 the Executive and Judicial officers of a State, or the members of the Legislature  
9 thereof[.]” U.S.CONST. Fourteenth Amend. § 2.

12 The **ninth** census counted 38,558,371 resident persons in the thirty-seven  
13 (37) United States, as of June 1, 1870. “[T]he House of Representatives shall be  
14 composed of two hundred and eighty-three [**283**] **members**, to be apportioned  
15 among the several States in accordance with the provisions of this act[.]”  
16 Apportionment Act of February 2, 1872, 42nd Cong., Sess. II, Ch. 11, Sec. 1.  
17 “[T]he following States shall be entitled to one [1] representative each in the  
18 Congress of the United States in addition to the number apportioned to such States  
19 by the act [of February 2, 1872], to wit: New Hampshire, Vermont, New York,  
20 Pennsylvania, Indiana, Tennessee, Louisiana, Alabama, and Florida[.]”  
21 Apportionment Act of May 30, 1872, 42nd Cong., Sess. II, Ch. 239.

24 The **tenth** census counted 50,189,209 resident persons in the thirty-eight  
25 (38) United States, as of June 1, 1880. “[T]he House of Representatives shall be  
26 composed of three hundred and twenty-five [**325**] **members**, to be apportioned  
27 among the several States as follows: [list][.]” Apportionment Act of February 25,  
28

1 1882, 47th Cong., Sess. I, Ch. 20. “[W]henever a new State is admitted to the  
2 Union the Representative or Representatives assigned to it shall be in addition to  
3 the number three hundred and twenty-five [325].” [Id.]  
4

5 The **eleventh** census counted 62,979,766 resident persons in the forty-two  
6 (42) United States, as of June 1, 1890. “[T]he House of Representatives shall be  
7 composed of three hundred and fifty-six [356] **members**, to be apportioned among  
8 the several States as follows: [list] [.]” Apportionment Act of February 7, 1891,  
9 51st Cong., Sess. II, Ch. 116. “[W]henever a new State is admitted to the Union  
10 the Representative or Representatives assigned to it shall be in addition to the  
11 number three hundred and fifty-six [356].” [Id.]  
12

13 The **twelfth** census counted 76,212,168 resident persons in the forty-five  
14 (45) United States, as of June 1, 1900. “[T]he House of Representatives shall be  
15 composed of three hundred and eighty-six [386] **members**, to be apportioned  
16 among the several States as follows: [list] [.]” Apportionment Act of January 16,  
17 1901, 56<sup>th</sup> Cong., Sess. II, Ch. 93. “[W]henever a new State is admitted to the  
18 Union the Representative or Representatives assigned to it shall be in addition to  
19 the number three hundred and eighty-six [386].” [Id.]  
20

21 The **thirteenth** census counted 92,228,496 resident persons in the forty-six  
22 (46) United States, as of April 15, 1910. Washington had the largest district, of  
23 228,027, and Nevada the smallest, of 80,293. “[T]he House of Representatives  
24 shall be composed of four hundred and thirty-three [433] **Members**, to be  
25 apportioned among the several States as follows: [list] [.]” Apportionment Act of  
26 August 8, 1911, 62nd Cong., Sess. I, Ch. 5. “[I]f the Territories of Arizona and  
27  
28



1 New Mexico shall become States in the Union before the apportionment of  
2 Representatives under the next decennial census they shall have one  
3 Representative each, and if one of such Territories shall so become a State, such  
4 State shall have one Representative, which Representative or Representatives shall  
5 be in addition to the number four hundred and thirty-three, as provided in section  
6 one of this Act[.]” [Id.]  
7

### 8 **C. Automatic Re-Apportionment Of 435 Seats – 1920 to Present.**

9

10 The **fourteenth** census counted 106,021,537 resident persons in the forty-  
11 eight (48) United States, as of January 1, 1920. New Mexico had the largest  
12 district, of 353,428, and Nevada the smallest, of 75,820. “In 1920, the Census  
13 Bureau did transmit apportionment counts to Congress, but Congress did not  
14 reapportion.”<sup>1</sup>  
15

16 The Permanent Apportionment Act of 1929 provides: “The President shall  
17 transmit to the Congress a statement showing the whole number of persons in each  
18 State ... as ascertained under the fifteenth and each subsequent decennial census  
19 of the population, and the number of Representatives to which each State would  
20 be entitled under an apportionment of the then existing number [435] of  
21 Representatives[.]” [Act of 1929, Sec. 22(a)]  
22

23 The **fifteenth** census counted 123,202,624 resident persons in the United  
24 States, as of April 1, 1930. New Mexico had the largest district, of 395,982, and  
25 Nevada the smallest, of 86,390.  
26

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27 <sup>1</sup>[https://www.census.gov/data/tables/time-series/dec/apportionment-data-](https://www.census.gov/data/tables/time-series/dec/apportionment-data-text.html)  
28 [text.html](https://www.census.gov/data/tables/time-series/dec/apportionment-data-text.html)

1           The **sixteenth** census counted 132,164,569 resident persons in the United  
2 States, as of April 1, 1940. Vermont had the largest district, of 359,231, and  
3 Nevada the smallest, of 110,247.  
4

5           Congress copied the 1929 Act in 1940:

6           [The 1929 Act] to provide for apportionment of Representatives in  
7 Congress ... is hereby amended in the first sentence of section 22 (a)  
8 by striking out the words “second regular session of the Seventy-First  
9 Congress” and substituting the following words: “first regular session  
10 of the Seventy-seventh Congress”, and by striking out “fifteenth” and  
11 inserting “sixteenth”.

12           54 Stat. 162, Sec. 1 (April 25, 1940).

13           Congress then made apportionment of 435 members permanent and  
14 automatic:

15           Each State shall be entitled, in the Seventy-eighth and in each Congress  
16 thereafter until the taking effect of a reapportionment under a  
17 subsequent statute[,] ... to the number of Representatives shown in the  
18 statement transmitted to the Congress on January 8, 1941, based upon  
19 the method known as the method of equal proportions, no State to  
20 receive less than one Member.

21           Permanent Apportionment Act of November 15, 1941, 77th Cong., Sess. I, Ch.  
22 470, Sec. 2(a).

23           2 U.S.C. § 2a(a) now provides:

24           On the first day, or within one week thereafter, of the first regular  
25 session of the Eighty-second Congress and of each fifth Congress  
26 thereafter, the President shall transmit to the Congress a statement  
27 showing the whole number of persons in each State ... as ascertained  
28 under the seventeenth and each subsequent decennial census of the  
population, and the number of Representatives to which each State  
would be entitled under an apportionment of the then existing number  
of Representatives [435] by the method known as the method of equal  
proportions, no State to receive less than one Member.

1 2 U.S.C. § 2a(b) now provides:

2 Each State shall be entitled, in the Eighty-third Congress and in each  
3 Congress thereafter until the taking effect of a reapportionment under  
4 this section or subsequent statute, to the number of Representatives  
5 shown in the statement required by subsection (a) of this section, no  
6 State to receive less than one Member.

7 The **seventeenth** census counted 151,325,798 resident persons in the United  
8 States, as of April 1, 1950. Rhode Island had the largest district (395,948) and  
9 Nevada the smallest (160,083).

10 The **eighteenth** census counted 179,323,175 resident persons in the fifty  
11 (50) United States, as of April 1, 1960. Maine had the largest district (484,633)  
12 and Alaska the smallest (226,167).

13 The **nineteenth** census counted 203,302,031 resident persons in the United  
14 States, as of April 1, 1970. North Dakota had the largest district (624,181) and  
15 Alaska the smallest (304,067).

16 The **twentieth** census counted 226,542,199 resident persons in the United  
17 States, as of April 1, 1980. South Dakota had the largest district (690,178) and  
18 Montana the smallest (393,345).

19 The **twenty-first** census counted 248,709,873 resident persons in the United  
20 States, as of April 1, 1990. Montana had the largest district (803,655) and  
21 Wyoming the smallest (455,975).

22 The **twenty-second** census counted 281,421,906 resident persons in the  
23 United States, as of April 1, 2000. Montana had the largest district (905,316) and  
24 Wyoming the smallest (495,304).  
25  
26  
27  
28

1 The **twenty-third** census counted 308,745,538 resident persons in the  
 2 United States, as of April 1, 2010. Montana had the largest district (994,416) and  
 3 Rhode Island the smallest (527,624).  
 4

5 The **twenty-fourth** census counted 331,449,281 resident persons in the  
 6 United States, as of April 1, 2020. Delaware had the largest district (990,837) and  
 7 Montana the smallest (542,704).  
 8

### 9 **ARGUMENT**

10 Individual standing, and justiciability, are both settled questions in favor of  
 11 Plaintiff, in “vote dilution” ‘one person, one vote’ claims. *Rucho v. Common*  
 12 *Cause*, 139 S.Ct. at 2495-96, 2501.

13 The Framers of the Constitution intended all House districts to have  
 14 approximately the same population, as did each Congress to legislate on the issue  
 15 in the 18<sup>th</sup> and 19<sup>th</sup> Centuries. [ECF 1 at 4 ¶15 (Framers); 5 ¶20 (2<sup>nd</sup> Cong.); 5 ¶22  
 16 (7<sup>th</sup> Cong.); 6 ¶26 (12<sup>th</sup> Cong.); 7 ¶30 (17<sup>th</sup> Cong.), ¶33 (22<sup>nd</sup> Cong.), ¶35 (27<sup>th</sup>  
 17 Cong.); 8 ¶36 (31<sup>st</sup> Cong.), ¶38 (32<sup>nd</sup> Cong.), ¶40 (37<sup>th</sup> Cong.); 10 ¶¶48-49 (42<sup>nd</sup>  
 18 Cong.); 11 ¶52 (47<sup>th</sup> Cong.); 11-12 ¶¶56-57 (51<sup>st</sup> Cong.); 12 ¶¶61-62 (56<sup>th</sup> Cong.);  
 19 and 15 ¶¶64-65 (62<sup>nd</sup> Cong.)]  
 20

21 Undoubtedly, the right of suffrage is a fundamental matter [] in a free  
 22 and democratic society. Especially since the right to exercise the  
 23 franchise in a free and unimpaired manner is preservative of other basic  
 24 civil and political rights, any alleged infringement of the right of  
 citizens to vote must be carefully and meticulously scrutinized.

25 *Reynolds v. Sims*, 377 U.S. at 561-62.

26 “[C]ongressional representation must be based on population as nearly as is  
 27 practicable.” *Reynolds v. Sims*, 377 U.S. at 577. *Reynolds*, which concerned  
 28

1 apportionment of state legislative seats in Alabama, explained that “All of the  
2 parties have agreed with the District Court's finding that legislative inaction for  
3 some 60 years in the face of growth and shifts in population has converted  
4 Alabama's legislative apportionment plan enacted in 1901 into one completely  
5 lacking in rationality.” *Reynolds v. Sims*, 377 U.S. at 588 (STEWART, J.,  
6 concurring).  
7

8 “Legislative inaction, coupled with the unavailability of any political or  
9 judicial remedy, had resulted, with the passage of years, in the perpetuated scheme  
10 becoming little more than an irrational anachronism.” *Reynolds*, 377 U.S. at 570.  
11

12 Legislators represent people, not trees or acres. Legislators are elected  
13 by voters, not farms or cities or economic interests. ... Overweighting  
14 and overvaluation of the votes of those living here has the certain effect  
15 of dilution and undervaluation of the votes of those living there. The  
16 resulting discrimination against those individual voters living in  
17 disfavored areas is easily demonstrable mathematically. ... Weighting  
18 the votes of citizens differently, by any method or means, merely  
19 because of where they happen to reside, hardly seems justifiable. One  
20 must be ever aware that the Constitution forbids ‘sophisticated as well  
21 as simpleminded modes of discrimination.’ ... ‘We do not believe that  
22 the Framers of the Constitution intended to permit the same vote-  
23 diluting discrimination to be accomplished through the device of  
24 districts containing widely varied numbers of inhabitants. To say that a  
25 vote is worth more in one district than in another would \* \* \* run  
26 counter to our fundamental ideas of democratic government \* \* \*.’

27 *Reynolds v. Sims*, 377 U.S. at 562-64 (internal citations omitted).  
28

“To the extent that a citizen’s right to vote is debased, he is that much less  
a citizen. The fact that an individual lives here or there is not a legitimate reason  
for overweighting or diluting the efficacy of his vote.” *Id.* at 567.

1 The complexions of societies and civilizations change, often with  
2 amazing rapidity. A nation once primarily rural in character becomes  
3 predominantly urban. Representation schemes once fair and equitable  
4 become archaic and outdated. But the basic principle of representative  
5 government remains, and must remain, unchanged—the weight of a  
6 citizen's vote cannot be made to depend on where he lives. Population  
is, of necessity, the starting point for consideration and the controlling  
criterion for judgment in legislative apportionment controversies.

7 *Id.*

8 “The conception of political equality from the Declaration of Independence,  
9 to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth  
10 Amendments can mean only one thing—one person, one vote.” *Gray v. Sanders*,  
11 372 U.S. 368, 381, 382 (1963) (“This case ... involves statewide elections of a  
12 United States Senator[.]”).

13  
14 Section 2 of Article I commands that Congressmen shall be chosen by  
15 the people of the several states by electors, the qualifications of which  
16 it prescribes. The right of the people to choose ... is a right established  
17 and guaranteed by the Constitution and hence is one secured by it to  
18 those citizens and inhabitants of the state entitled to exercise the right.  
19 ... Obviously included within the right to choose, secured by the  
20 Constitution, is the right of qualified voters within a state to cast their  
21 ballots and have them counted at Congressional elections. This Court  
22 has consistently held that this is a right secured by the Constitution. ...  
And since the constitutional command is without restriction or  
limitation, the right unlike those guaranteed by the Fourteenth and  
Fifteenth Amendments, is secured against the action of individuals as  
well as of states.

23 *United States v. Classic*, 313 U.S. 299, 314-15 (1941) (internal citations omitted).

24 “The Fifth Amendment ... does not contain an equal protection clause as  
25 does the Fourteenth Amendment which applies only to the states. But the concepts  
26 of equal protection and due process, both stemming from our American ideal of  
27

1 fairness, are not mutually exclusive.” *Bolling v. Sharpe*, 347 U.S. 497, 499-500  
2 (1954). “The [Due Process Clause of the Fifth Amendment] requires that Congress  
3 treat similarly situated persons similarly, not that it engage in gestures of  
4 superficial equality.” *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981) (regarding  
5 Military Selective Service Act). “[B]asic due process and equal protection  
6 principles [are] applicable to the Federal Government.” *U.S. v. Windsor*, 570 U.S.  
7 744, 769-70 (2013) (regarding Defense Of Marriage Act) (citing U.S.CONST.,  
8 Fifth Amend.; and *Bolling v. Sharpe*, 347 U.S. at 499-500). “The liberty protected  
9 by the Fifth Amendment's Due Process Clause contains within it the prohibition  
10 against denying to any person the equal protection of the laws.” *Windsor*, 570 U.S.  
11 at 774 (citations omitted).

12 “[T]he Citizenship Clause [of the Fourteenth Amendment] guarantees  
13 citizens equal treatment by the Federal Government with respect to civil rights.”  
14 *U.S. v. Vaello Madero*, 142 S.Ct. 1539, 1551 (2022) (Thomas, J., Concurring).

15 Rejecting the contention that apportionment under Article I is a non-  
16 justiciable political question, the *Wesberry* court explained that “The right to vote  
17 is too important in our free society to be stripped of judicial protection by such an  
18 interpretation of Article I.” *Wesberry v. Sanders*, 376 U.S. at 7.

19 We hold that, construed in its historical context, the command of Art.  
20 I, s 2, that Representatives be chosen ‘by the People of the several  
21 States’ means that as nearly as is practicable one man's vote in a  
22 congressional election is to be worth as much as another's. This rule is  
23 followed automatically, of course, when Representatives are chosen as  
24 a group on a statewide basis, as was a widespread practice in the first  
25 50 years of our Nation's history. ... The history of the Constitution,  
26 particularly that part of it relating to the adoption of Art. I, s 2, reveals  
27  
28



1 that those who framed the Constitution meant that, no matter what the  
2 mechanics of an election, whether statewide or by districts, it was  
3 population which was to be the basis of the House of Representatives.  
[pp. 7-9] ...

4 The debates at the Convention make at least one fact abundantly clear:  
5 that when the delegates agreed that the House should represent 'people'  
6 they intended that in allocating Congressmen the number assigned to  
7 each State should be determined solely by the number of the State's  
8 inhabitants. The Constitution embodied Edmund Randolph's proposal  
9 for a periodic census to ensure 'fair representation of the people,' an  
10 idea endorsed by Mason as assuring that 'numbers of inhabitants'  
11 should always be the measure of representation in the House of  
12 Representatives. The Convention also overwhelmingly agreed to a  
13 resolution offered by Randolph to base future apportionment squarely  
14 on numbers and to delete any reference to wealth. And the delegates  
15 defeated a motion made by Elbridge Gerry to limit the number of  
16 Representatives from newer Western States so that it would never  
17 exceed the number from the original States. ... The House of  
18 Representatives, the Convention agreed, was to represent the people as  
19 individuals, and on a basis of complete equality for each voter. [pp. 13-  
20 14] ...

21 It is in the light of such history that we must construe Art. I, s 2, of the  
22 Constitution, which, carrying out the ideas of Madison and those of like  
23 views, provides that Representatives shall be chosen 'by the People of  
24 the several States' and shall be 'apportioned among the several States \*  
25 \* \* according to their respective Numbers.' It is not surprising that our  
26 Court has held that this Article gives persons qualified to vote a  
27 constitutional right to vote and to have their votes counted. ... Not only  
28 can this right to vote not be denied outright, it cannot, consistently with  
Article I, be destroyed by alteration of ballots, ... or diluted by stuffing  
of the ballot box[.] ... No right is more precious in a free country than  
that of having a voice in the election of those who make the laws under  
which, as good citizens, we must live. Other rights, even the most basic,  
are illusory if the right to vote is undermined. Our Constitution leaves  
no room for classification of people in a way that unnecessarily  
abridges this right. In urging the people to adopt the Constitution,  
Madison said in No. 57 of The Federalist:

    'Who are to be the electors of the Federal Representatives?  
    Not the rich more than the poor; not the learned more than  
    the ignorant; not the haughty heirs of distinguished names,



1 more than the humble sons of obscure and unpropitious  
2 fortune. The electors are to be the great body of the people  
3 of the United States. \* \* \*

4 Readers surely could have fairly taken this to mean, ‘one person, one  
5 vote.’ ...While it may not be possible to draw congressional districts  
6 with mathematical precision, that is no excuse for ignoring our  
7 Constitution's plain objective of making equal representation for equal  
8 numbers of people the fundamental goal for the House of  
9 Representatives. That is the high standard of justice and common sense  
10 which the Founders set for us. [pp. 17-18]

11 *Wesberry*, 376 U.S. at 7-9; 13-14; 17-18 (internal citations omitted).

12 In 1992, in response to a challenge by Montana after it lost one of its House  
13 seats, the Supreme Court explained that the “method of equal proportions” was  
14 satisfied in light of “the need to allocate a fixed number of indivisible  
15 Representatives among 50 States of varying populations makes it virtually  
16 impossible to have the same district size in any pair of States, let alone 50.” *U.S.*  
17 *Dept. of Commerce v. Montana*, 503 U.S. 442, 463 (1992). [ECF 1 at 43-44] The  
18 *Montana* court did not analyze whether capping the number of representatives at  
19 435 itself could violate citizens’ rights to equal representation in the House [Art.  
20 I, § 2] and in the electoral college [Art. II, § 1], or the ‘one person, one vote’  
21 principle, particularly in light of a growing population. 503 U.S. at 451 and n. 24.

22 In 2019, the Supreme Court decided *Rucho*:

23 In the leading case of *Baker v. Carr*, voters in Tennessee complained  
24 that the State’s districting plan for state representatives “debase[d]”  
25 their votes, because the plan was predicated on a 60-year-old census  
26 that no longer reflected the distribution of population in the State. The  
27 plaintiffs argued that votes of people in overpopulated districts held less  
28 value than those of people in less-populated districts, and that this  
inequality violated the Equal Protection Clause of the Fourteenth  
Amendment. The District Court dismissed the action on the ground that  
the claim was not justiciable, relying on this Court’s precedents[.] ...

This Court reversed. It identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is “a lack of judicially discoverable and manageable standards for resolving it.” 369 U.S. at 217, 82 S.Ct. 691. The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles. *Id.*, at 226, 82 S.Ct. 691. In *Wesberry v. Sanders*, the Court extended its ruling to malapportionment of congressional districts, holding that Article I, § 2, required that “one man’s vote in a congressional election is to be worth as much as another’s.” 376 U.S. at 8, 84 S.Ct. 526.

*Rucho*, 139 S.Ct. at 2496, 2501.

The *de facto* 435-member cap, 2 U.S.C. § 2a(a), violates ‘one person, one vote’, because the weight of a person’s vote depends upon in which state they reside.

### CONCLUSION

The Constitution requires that all House congressional districts be of roughly equal size – not just within each state, but among them as well. Otherwise, neither the House nor the electoral college function as intended.

Equalizing the population size of Congressional districts both within and among States is justiciable, and Plaintiff has standing, as recently confirmed by the *Rucho* court. Defendant’s motion to dismiss should be denied.

Submitted this 7<sup>th</sup> day of October, 2022,

**KSB LITIGATION, P.S.**

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 7, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice. I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

[NONE]

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